Supreme Court, U.S.
FILED
MAY 4 1992
OFFICE OF THE CLERK

(2)

No. 91-1583

In The

Supreme Court of the United States

October Term, 1991

DR. NOLAN L. KINSEY,

Petitioner,

v.

SALADO INDEPENDENT SCHOOL DISTRICT,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM C. BEDNAR, JR.
Attorney of Record
for Respondent

Please serve:

WILLIAM C. BEDNAR, JR.
ESKEW, MUIR & BEDNAR
2050 Bank One Tower
221 West 6th Street
Austin, Texas 78701
(512) 477-6175

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

(1) Whether a Texas public school superintendent is exempt from protection of the First Amendment as a "policymaker" and "confidential employee" where his speech and political position make the extent of the school board's management authority over him the central issue in a school board election and his services are later terminated by trustees elected in opposition to his policy views.

(2) Whether a public employee's exemption from First Amendment protection as a "policymaker" or a "confidential employee" is a question of law for the court or a question of fact for the factfinder, here a jury.

(3) Whether a public school superintendent's interest in free speech is to be balanced against his school district's interest in effective and efficient government where the trustees who terminated his services deny that his speech or political position caused their decision.

TABLE OF CONTENTS

Page

Table of Contents ii

Table of Authorities iii

Counter Statement of the Case 1

Reasons for Denying the Writ 6

Conclusion and Prayer 16

TABLE OF AUTHORITIES

Page

CASES

Branti v. Finkel, 445 U.S. 507 (1980) 8, 9, 11

Connick v. Meyers, 461 U.S. 138 (1983).. 8, 9, 10, 11, 13, 14

Copp v. Unified School Dist. No. 501, 882 F.2d 1547 (10th Cir. 1989)..... 14

Elrod v. Burns, 427 U.S. 347 (1976) 8, 9, 11

Hudson v. Burke, 913 F.2d 427 (7th Cir. 1990) 12

McBee v. Jim Hogg County, Texas, 730 F.2d 1009 (1984) 11

McCollum v. Stahl, 579 F.2d 869 (4th Cir. 1978) 11

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) 13, 14, 15

Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981)..... 11

Pickering v. Board of Education, 391 U.S. 563 (1968) ..*passim*

Rankin v. Independent School District No. I-3, 876 F.2d 838 (10th Cir. 1989)..... 14

Rutan v. Republican Party of Illinois, ___ U.S. ___, 110 S.Ct. 2729 (1990) 8

Saye v. St. Vrain Valley School Dist. RE1J, 785 F.2d 862 (10th Cir. 1986)..... 15

Soderbeck v. Burnett County, Wis., 752 F.2d 285 (7th Cir. 1985) 11

TABLE OF AUTHORITIES – Continued

Page

Upton v. Thompson, 930 F.2d 1209 (7th Cir. 1991)..... 12

Ware v. Unified School Dist. No. 492, 881 F.2d 906 (10th Cir. 1989)..... 14

STATUTES

19 TEX. ADMIN. CODE §§ 29-173 (West 1988 and 1992 Supp.)..... 2

TEX. EDUC. CODE ANN. § 13.351(a) (Vernon 1991)..... 2

TEX. EDUC. CODE ANN. § 23.26(b) (Vernon 1987)..... 2

TEX. EDUC. CODE ANN. § 23.28(a) (Vernon 1987)..... 2

TEX. REV. CIV. STAT. ANN. art. 6252-17a § 5(a) (Vernon Supp. 1992)..... 3

CONSTITUTION

United States Constitution, First Amendment 7, 12, 14, 16

No. 91-1583

In The

Supreme Court of the United States

October Term, 1991

DR. NOLAN L. KINSEY,

Petitioner,

v.

SALADO INDEPENDENT SCHOOL DISTRICT,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

To the Honorable Justices of The Supreme Court Of The United States:

Salado Independent School District, Respondent, files this Brief in Opposition to the Petition for Writ of Certiorari filed by the Petitioner, Dr. Nolan Kinsey, and would show as follows:

COUNTER STATEMENT OF THE CASE

A. Statement of the Facts

Petitioner's statement of the case is substantially correct so far as it goes, but does not mention important

features of Texas law bearing on the employment relationship between the board of trustees of an independent school district and its superintendent. The Petition also omits important matters of record bearing on the subject of Petitioner's speech and political position, his motive, and the disruptive effect of his electioneering on governance of the school district.

In Texas, the board of trustees of an independent school district is vested by statute with the "exclusive power to manage and govern the public schools." TEX. EDUC. CODE ANN. § 23.26(b) (Vernon 1987). The school board "may employ by contract a superintendent," *id.* § 23.28(a), who in turn acts as the "educational leader and administrative manager of the school district," *id.* § 13.351(a) (Vernon 1991). There is no Texas statute bestowing a property interest in the position of superintendent or limiting the management prerogatives of the board in respect to the superintendent.

Even so, the school board is a body corporate and can act only by majority vote at a duly-called meeting. It is totally dependent on the superintendent to interpret and effectuate its policies, directives, and decisions. It takes but a brief perusal of the hundreds of pages of technical regulations issued by the Texas Education Agency for the administration of public education, 19 TEX. ADMIN. CODE §§ 29-173 (West 1988 and 1992 Supp.) to appreciate that the superintendent, hired for his qualifications and expertise in interpreting and applying them, stands in a policymaking position in respect to his lay board of trustees, whose written policies, directives, and decisions cannot anticipate the myriad problems encountered in running the schools and whose ability to supervise is limited to

monthly board meetings and the occasional specially-called meeting.

The superintendent also stands in a confidential relationship to the board of trustees under Texas law. The superintendent is frequently required to advise the board of trustees in closed sessions in connection with real property transactions, prospective gifts and donations, personnel grievances and hearings, student discipline cases, security personnel or devices, consultation agreements with teachers, and receiving information from employees. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art 6252-17, § 2(f), (g), (h), (j), (m), and (r) (closed sessions authorized by Texas Open Meetings Act.) As the officer for public records of the district, TEX. REV. CIV. STAT. ANN. art. 6252-17a § 5(a) (Vernon Supp. 1992), the superintendent is the custodian of confidential documents such as personnel files, litigation files, sealed bids, prospective real or personal property acquisitions and associated appraisals and purchase price information, drafts and working papers involved in the preparation of proposed policies, interagency and intraagency memorandums, student records, home addresses and telephone numbers designated as private by officials and employees, and curriculum objectives and test items. *Id.* § 3(a)(2), (3), (4), (5), (6), (11), (14), (17) and (22) (information deemed confidential by Texas Open Records Act).

Nowhere in Texas law, however, is there any limitation upon the exclusive power of the board of trustees to manage and govern the public schools of the district.

Against this statutory setting, Petitioner's speech and political position in the school board election of 1988

consisted of his fundamental disagreement with a slate of candidates, who became the four-member majority elected to govern him, regarding the extent of authority the board was to exercise in managing and governing the school district. Petitioner and the incumbent "Berry slate" supported limiting the board's role strictly to the enactment of policy, leaving the operation of the school district to the school administrators. Fueled by widespread public dissatisfaction with Petitioner's administration of the district, the opposing "Hagler slate" supported a more active role for the board in running the schools. In the largest voter turnout in the history of the school district, the Hagler slate won the election by a wide majority.

The context of Petitioner's speech and political position does not show that he was speaking as a citizen, or that what he said was of public concern. Petitioner was plainly the focal point of the election. But the public's concern, and the reason the public wanted closer supervision over the superintendent, were the myriad problems of his superintendency, not what his position may have been regarding the board-superintendent relationship. Almost a year earlier, Petitioner had angered the community by proposing a weighted grading system seemingly calculated to give his daughter an advantage in becoming valedictorian. Since September 1987, he and the incumbent trustees he supported had resisted public disclosure of teachers' credentials, yet serious deficiencies in 44% of the district's teachers had come to light in a barrage of publicity just before the election. In January 1988, a bare majority of the board had voted to extend his contract, but only after two prolonged executive sessions devoted to problems with his performance. He knew that if the

Hagler slate were elected, he would have serious problems with his employment, and on cross-examination he admitted that his principal motive was to save his job. The district court, who was able to judge Petitioner's demeanor, found that his speech was only voiced in an attempt to protect his job. Petition For Writ of Certiorari, Appendix at 63.

Petitioner's electioneering was pervasively disruptive to governance of the school district after the election. Every action he took in regard to the new four-member majority showed that he still adhered to his political position and disavowed their authority over him. Petitioner selectively shut off board contact with his staff and rigidly controlled all information that went to the trustees except for his ally, trustee Jean Tarbutton. He insisted on a formal open records request before he would provide the new board president with his contract and the high school principal's contract. He communicated with the board, if at all, mostly through legal counsel. In interviewing new staff members, he was openly contemptuous of the board majority. Warring factions in the community attended each school board meeting by the hundreds, clamoring for or against Petitioner's termination. When the board majority attempted to work out directives with Petitioner in a last-ditch effort to work with him, he took immediate offense, assumed the board majority was just trying to document his eventual dismissal, and refused to participate in any meaningful way in the development and refinement of the directives. Less than a month before the start of school in August 1988, and with vacancies in every other administrative position in the district, he unilaterally went on vacation. When he returned, he

publicly disagreed with the directives, insisted on quarreling about them through his lawyer, and gave only token compliance, specifically violating two of them by failing to consult with the board president in putting items on the board agenda and allowing personal feelings to interfere with a teacher hiring decision. At trial in 1989, Petitioner testified that he was not only for the Berry slate but was openly against the platform and election of the Hagler slate, that he had never "backed up or backed away from those people" and that he was still of the opinion that he and the Berry slate were correct on the proper role of the school board. During the election, afterward up to the moment of his relief from duty, and as of the date of trial, Petitioner continued to insist on his belief and position that the board should have no active role in managing and governing the schools.

B. Course of Proceedings and Disposition in the Courts Below

The statement of the case in the Petition is substantially correct as to the course of proceedings and disposition in the courts below.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals Correctly Determined That Petitioner was a Policymaker and Confidential Employee.

So far as Respondent has been able to discover, this is the only reported instance in which the chief executive

employee of a locally-elected governmental board has sought to invoke First Amendment protection for speech challenging the board's authority over him against the election of board members whose policies, directives, and decisions it is the essence of his position to interpret and implement. Judicial resolution of the constitutional issues involved would not appear to be frequent or beset with any difficulty in applying the guiding precedent from this Court. As pointed out in Judge Gee's dissent to the panel decision, it should go without saying that:

> " . . . The highest executive in a public school system [may not], by deliberately injecting himself into and making his policy views a central issue in a school board election, so entrench himself in office that he cannot be discharged even though the voters rejected both the views that he espoused and his surrogates, the candidates whom he sought to elect.
>
> " . . .
>
> "No lengthy writing is called for in dissent, it seems to me, for I do not think that this can be the law; to state the proposition is to refute it.
>
> " . . .
>
> "The relationship is all but symbiotic, and a ruder violation of it than public campaigning by the superintendent for one faction of the board against another can scarcely be imagined." Petition for Writ of Certiorari, Appendix at 56, 57, 60.

The guideposts established in the prior decisions of this Court are clear and, insofar as the balancing of Petitioner's interests in speech against Respondent's

interest in effective and efficient government is concerned, were correctly applied by the Court of Appeals. In determining whether a public employee's speech is protected by the First Amendment, there are two threshold issues of law: (1) whether the employee's speech was on a matter of public rather than private concern, *Connick v. Meyers,* 461 U.S. 138 (1983); and (2) whether the employee's interest in speech is outweighed by legitimate governmental interests of the employer. *Pickering v. Board of Education,* 391 U.S. 563 (1968). These threshold inquiries are purely questions of law, which the Court is to resolve independently upon its own assessment of the evidence. *Connick v. Meyers,* 461 U.S. 138, 148 n. 7, 150 n. 10 (1983). While the First Amendment generally protects public employees from discharge because of their political affiliation, holders of policy level or confidential positions are excluded from this protection where political affiliation is shown to be an appropriate requirement for the effective performance of the public office involved. *Branti v. Finkel,* 445 U.S. 507 (1980); *Elrod v. Burns,* 427 U.S. 347 (1976); *see, Rutan v. Republican Party of Illinois,* ___ U.S. ___, 110 S.Ct. 2729 (1990).

There is an insulting lack of substance and precision in the global argument at page 8 of the Petition that this Court has not addressed "the appropriate test to be used to evaluate a discharged public employee's claim of discharge for the exercise of protected rights of speech and association" or "the scope of the concept that certain public employees in certain positions may not enjoy First Amendment protection." Has Petitioner not read *Pickering, Elrod,* and *Branti*? Nowhere does Petitioner explain how those decisions leave unsettled the questions he

attempts to raise. Nowhere does Petitioner explain why the decision of the Court of Appeals in this case was not in accord with those cases.

Respondent submits that the decision of the Court of Appeals represents a straightforward application of the principles announced in *Pickering, Elrod,* and *Branti* under undisputed facts leaving no doubt that Petitioner was a policymaker and confidential employee whose loyalty to the management philosophy embodied in the electoral mandate to the new trustees was an appropriate requirement for effective performance of his position as the board's chief executive and administrative officer. The important question of federal law is whether the First Amendment shelters this loyalty in that position, and the prior decisions of this Court have already settled that question against Petitioner. Petitioner merely disagrees with a correct application of those principles to him by the Court of Appeals, which does not present either an unsettled question of federal law or a conflict with the applicable decisions of this Court.

Moreover, there is an independent ground upon which to sustain the decision of the Court of Appeals which, if review were granted, would preclude this Court from reaching the federal questions Petitioner attempts to raise. In *Connick v. Meyers,* 461 U.S. 138 (1983), this Court held that if a public employee's speech does not address a matter of public concern, as determined by its content, form, and context, it is unnecessary to scrutinize the reasons for the employee's discharge by balancing the employee's right to free speech against the employer's interest in efficient public service under *Pickering. Connick v. Meyers, supra,* 461 U.S. at 146-149. There is reason to

disagree with the Court of Appeals' determinations that Petitioner's conduct consisted of both "speech" and "association" and involved matters of public concern. Petition for Writ of Certiorari, Appendix at 8-9, 16. Although the Court of Appeals bases over thirteen pages of legal analysis on its conclusion that both "speech" and "association" were involved, the record shows and Petitioner concedes (Petition for Writ of Certiorari at 4) that Petitioner's only conduct was to engage in private conversations with Salado citizens and cause a letter complimentary to Berry's performance to be published in the local newspaper. There is no evidence of any non-speech political activity on his part.

Accordingly, whether or not Petitioner was speaking as a citizen on a matter of public concern would be a threshold issue for this Court to decide if review were granted. As detailed in the Counter Statement of the Case, *supra* at 4-5, there is ample evidence to support the district court's conclusion that Petitioner's speech was not on a matter of public concern but was only voiced out of private concern for the security of his job. There would be no reason to address the questions raised in the Petition, which relate to the *Pickering* balance.

B. No Substantial Conflict With Other Circuits Exists Regarding the "Policymaker/Confidential Employee" Exception.

In *Connick* this Court determined that the inquiry into the protected status of speech is one of law, not fact,

and nothing in the opinion or the authorities cited suggests that anything less than the entire *Pickering* balance is encompassed by that rule. *Connick v. Meyers,* 461 U.S. 138, 148 n. 7, 150 n. 10 (1983). Since the responsiveness of elected officials to voter mandates lies at the core of efficient and effective representative government in a democracy, the Court of Appeals is clearly correct in characterizing the "policymaker/confidential employee" exception of *Elrod/Branti* as an ingredient in the *Pickering* balance. Petition for Writ of Certiorari, Appendix 10-15; *McBee v. Jim Hogg County, Texas,* 730 F.2d 1009, 1014 (1984). It is likewise clear that whether a public employee is exempted from First Amendment protection as a "policymaker" or "confidential employee" is a question of law involving the independent constitutional judgment of the Court.

The cases in other circuits cited by Petitioner at page 9 of the Petition do not present any significant conflict with this principle. It is true that in each case the question of whether a public employee fell within the "policymaker/confidential employee" exception was required to be submitted to a jury. However, it should be noted that *McCollum v. Stahl,* 579 F.2d 869 (4th Cir. 1978) and *Nekolny v. Painter,* 653 F.2d 1164 (7th Cir. 1981) predate *Connick,* and that no authority was advanced to the Court in *Soderbeck v. Burnett County, Wis.,* 752 F.2d 285 (7th Cir. 1985), in support of defendant's argument that whether or not an employee exercises a policymaking role or is a repository of confidences that make loyalty an essential part of his job description should always be a question of law. *Id.* at 288-289. Recent decisions in the Seventh Circuit decide these issues as a matter of law at the appellate

level, with only lip service paid to the role of the fact-finder. *See, e.g., Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir. 1991) (dissenting opinion); *Hudson v. Burke*, 913 F.2d 427 (7th Cir. 1990). In light of this Court's clear guidance in *Connick*, it is very likely that future decisions in the Fourth and Seventh Circuits will hold that the "policymaker/confidential employee" exception presents a question of law.

Moreover, the judgment notwithstanding the verdict entered by the district court and affirmed by the Court of Appeals should be sustained on the independent ground that no issue of controverted fact upon which reasonable minds could differ existed as to Petitioner's position as a "policymaker" and "confidential employee." The nature of a Texas school superintendent's position is so indisputable under the evidence in this case and as a matter of Texas law that the judgment notwithstanding the verdict would have been proper even if the issue were regarded as one of fact. Accordingly, the asserted conflict with decisions in the Fourth and Seventh Circuit is moot and would not be reached in the event this Court granted review.

C. No Conflict Exists Regarding Availability of the *Pickering* Defense.

Petitioner's final point appears to be that the employer in a First Amendment employment case must forego a defense under *Pickering* if it denies that the employee's speech motivated its decision to terminate the employee. The idea, it seems, is that Petitioner's speech and political position were unknown to the trustees in the

present case and perforce could not have been disruptive to the employment relationship.

Petitioner thus disagrees with jury findings entered in his favor pursuant to *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). The jury in this case found that Petitioner's speech was a substantial motivating factor in the decision to relieve him with pay and that the decision would not have occurred in the absence of his speech. But if, as Petitioner now asserts, the trustees did not know of his speech or political position, then that was obviously not a substantial motivating factor, and their decision would have been the same had it not occurred. Petitioner cannot have his cake and eat it too.

But more fundamentally, it is immaterial to the *Pickering* balance whether or not the trustees who voted to relieve Petitioner with pay knew of his speech or political position. Certainly one element of the *Pickering* balance is whether the employee's speech is actually or potentially disruptive to the employment relationship. But it is a misstatement of the law for Petitioner to argue that actual disruption is absolutely required. In *Connick*, the employee's dismissal was upheld because the questionnaire constituting her speech carried the clear potential for undermining office relations. *Connick v. Meyers*, 461 U.S. 138, 152 (1983). As a matter of reason, logic, and common sense, an employee's speech or political position need not be known to the employer to be potentially or actually disruptive of the employment relationship. In the present case, Petitioner's speech and political position were fatal to the employment relationship whether the trustees knew of it or not, as evidenced by the discord in the community and between Petitioner and the board

majority after the election. The Court of Appeals properly took account of these factors in striking the *Pickering* balance in favor of the employer. Petition for Writ of Certiorari, Appendix at 18-19.

Nothing to the contrary is contained in the cases from the Tenth Circuit cited by Petitioner, which are distinguishable in both fact and principle. In *Copp v. Unified School Dist. No. 501*, 882 F.2d 1547 (10th Cir. 1989), a high school custodian opposed transfer of his principal to another school, whereupon the school board transferred him to a less responsible and more physically arduous job. In reversing a judgment notwithstanding the verdict for the employer on *Connick/Mt. Healthy* grounds, the Tenth Circuit observed in dictum that defendant presented no evidence that plaintiff's speech had any deleterious effect on discipline, working relationships, plaintiff's performance, or regular operations of school. *Id.* at 1552. In *Ware v. Unified School Dist. No. 492*, 881 F.2d 906 (10th Cir. 1989), a secretary claimed the superintendent had discharged her in retaliation for her disapproval of a proposal in a bond issue. There likewise, the employer did not assert or support with evidence the existence of a confidential employment relationship, disruptive effect, or any other ingredient of a *Pickering* defense. *Id.* at 910. In *Rankin v. Independent School District No. I-3*, 876 F.2d 838 (10th Cir. 1989), a tenured teacher who spoke with parents and at school board meetings against corporal punishment suffered a directed verdict that his speech was not protected by the First Amendment. The disputed issue was whether the teacher spoke on a matter of public concern, which the Tenth Circuit resolved in favor of the teacher. In dictum relegated to a

footnote, the court observed without analysis that the *Pickering* balance was not at issue since the defendants did not claim the speech was disruptive but rather played no part in their decision. *Id.* at 842-844, n. 8. *Saye v. St. Vrain Valley School Dist. RE1J*, 785 F.2d 862 (10th Cir. 1986) involved nonrenewal of a special education teacher who claimed retaliation for activities as faculty representative of a union. Again, the employer did not argue that its interest in efficient and effective government supported the decision to terminate the employee, but limited its defense to the *Mt. Healthy* causation issues. *Id.* at 867.

These decisions do not present any conflict in principle with the decision below. In each case, the employer simply failed to raise a *Pickering* defense, which the Tenth Circuit resolved on the principle that a party is not entitled to prevail on issues of fact or law not raised or supported with evidence.

In the present case, Respondent raised the *Pickering* defense on motion for summary judgment prior to trial, on motions for directed verdict at trial, and on motion for judgment notwithstanding the verdict after trial. At every stage, Respondent supported its *Pickering* defense with comprehensive evidence of the nature of Petitioner's position and employment relationship with the board of trustees, the political platform upon which each candidate on the Hagler slate ran for election, controversy over Petitioner's superintendency prior to and during the election campaign, and the destruction of the working relationship between Petitioner and Respondent after the election with consequent disruption of the governmental processes of the school district. Unlike the Tenth Circuit cases cited by Petitioner, the Court of Appeals here was

squarely confronted with a *Pickering* defense properly raised and amply supported by evidence, which it correctly resolved in Respondent's favor.

The alleged conflict in circuits is illusory. The only conflict of authority is between the Petitioner's position and the precedents of this Court.

CONCLUSION AND PRAYER

Petitioner has failed to satisfy the requirements for review on certiorari and no extraordinary reason exists for the granting of the Writ by this Court. The decision below is correct and consistent with this Court's jurisprudence. The decision of the Court of Appeals does not pose any significant conflict with the decisions of courts of appeals in other circuits. The Court of Appeals correctly held that Petitioner's speech and association were not protected by the First Amendment, and there is no reason to review that decision. Accordingly, Respondent respectfully submits that the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

William C. Bednar, Jr.
Eskew, Muir & Bednar
2050 Bank One Tower
221 West 6th Street
Austin, Texas 78701
(512) 477-6175
(512) 477-6617